Supreme Court of the United States

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

Brief of Wisconsin Employment Relations Board

GROVER L. BROADFOOT,
Attorney General,

STEWART G. HONECK,
Deputy Attorney General,

BEATRICE LAMPERT,
Assistant Attorney General,

Attorneys for Wisconsin Employment Relations Board.

THE GILMAN PRESS, MADISON, WISCONSIN

INDEX

CASES CITED

STATUTES INVOLVED

Federal Statutes

CONSTITUTIONAL PROVISIONS

TEXTS

Supreme Court of the United States

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

Brief of Wisconsin Employment Relations Board

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Wisconsin is reported in 250 Wis. 550, 27 N. W. 2d 875, and appears at pages 106-121 of the printed record. Judgment has been entered in the Circuit Court for Milwaukee County pursuant to such opinion.

STATEMENT AS TO JURISDICTION

A. Federal Statutes Involved

Jurisdiction has been invoked by the petitioners under sec. 237 (b) of the Judicial Code, 43 Stat. 937 (Feb. 13, 1925, c. 229 sec. 1), 28 U. S. C. A. sec. 344 (b), on the ground that the order of the Wisconsin Employment Relations Board, which was affirmed and enforced by the decision of the State Supreme Court, was issued pursuant to a state statute infringing upon a domain occupied by Congress under its power to regulate commerce, and depriving petitioners of rights guaranteed to them by Congressional legislation and by the Constitution of the United States.

The order of the state board and the decision of the State Supreme Court were issued prior to the enactment of the Labor-Management Relations Act, 1947, 61 Stat. pp. 36-161, 29 U. S. C. A., secs. 141-197 (Taft-Hartley Act). Such federal questions as were raised in the state courts were accordingly decided with reference to the federal legislation then in effect, i.e., the National Labor Relations Act, 49 Stat. 449-457, 29 U. S. C. A. (1945) secs. 151-166. (Wagner Act).

Since the effect of the judgment entered in the state court is continuing, the questions respecting its present validity and effectiveness would be based upon the federal legislation now existing rather than upon that which existed at the time the action was taken.

The orders allowing certiorari constitute, we assume, a determination that federal questions are presented. Since the questions are to be considered, it is the hope of this respondent that they can be resolved on the basis of cur-

rent federal legislation so as to provide the greatest possible guidance for future action.

B. Issues Presented

The petitioners' "Statement as to Jurisdiction" contains a purported summary of the federal questions decided by the state court, which does not seem to us to be an accurate frame-work for the deliberations of this court. Both argument and deliberation will be simplified by an exact definition of the questions to be considered. It is our belief that the questions to be determined, stated as concisely as possible, are:

1. Does an order of a state board violate the commerce clause of the constitution by denying to the petitioners the use of a new coercive tactic designed by them to interfere with production, through the device of inducing employees to engage in a concerted program of repeated absences, of a few hours duration, during scheduled working hours?

2. Does such an order violate constitutional provisions relating to involuntary servitude, freedom of assembly, and freedom of speech?

A mere quotation of the state board's order is insufficient to frame the issues because the order has been restricted by interpretation of the Supreme Court of Wisconsin. That court interpreted the words of the order by saying that what it does, "and all that it does is to ban the individual defendants and the members of the union from engaging in concerted effort to interfere with production *by doing the acts instantly involved*" (R. 113). The peti-

tioners urged before the Wisconsin court that the order was unconstitutional because it purported to ban certain conduct such as the quitting of work for the purpose of going to work elsewhere, but the court said that "the order has no such far-reaching effect either upon individuals or upon employees acting in concert." Since the only thing prohibited by the order as interpreted by the Wisconsin court is the conduct in which the petitioners were found to have engaged, that conduct must be characterized in presenting an issue involving the validity of the state board's order.

The petitioners have attempted to describe the purport of the state action at several points in their brief, as in the specification of errors, by saying that it prohibits "engaging in peaceful work stoppages." In the first place, the portion of the order challenged (as distinct from the other portion of the order, which was based on threats and damage to property) is aimed at instigation and is not directed against mere participation. Further, the description of the tactic contained in the specification of errors omits the objectionable elements which called forth the proscription.

In the first part of the state court's opinion (R. 109), it merely quoted and reiterated the board's order; and in the later portion restricted the effect of the order by interpretation (R. 113, 115-116).

The assertion that the forbidden tactics are "not associated with any violence" is not strictly accurate, since the unchallenged part of the state board's order (and the only part banning mere individual participation) was based on threats and property damage. It is conceded, however, that the association with violence was incidental, and it is urged

that such a background is unnecessary to sustain the validity of the challenged portion of the order.

FACTS

The Briggs and Stratton Corporation (hereinafter referred to as the company or the employer) operates two manufacturing plants within the State of Wisconsin, and its employees work wholly within the boundaries of such state (R. 26). The International Union, U. A. A. W. A., A. F. of L., Local 232 (hereinafter referred to as Local 232) represents most of the company's production employees as their collective bargaining agent (R. 40-41). A contract between the employer and Local 232 expired July 1, 1944, and the parties undertook negotiations for a new agreement. At the time of the events to be described a new contract had not been signed (R. 34-35).

Among the matters upon which agreement had not been reached were the demands of Local 232 that members be required to maintain their membership as a condition of employment, and for check-off of dues (R. 35, 40, 47). No referendum had been conducted among the employees to approve a provision for maintenance of membership until more than four months after the inception of the program hereinafter described. Such a referendum is essential under the state law to the validity of a contract providing for compulsory unionism (R. 40). Neither had the conditions imposed by state law been met to authorize a check-off of dues.

With the bargaining process at such a stage, a meeting of Local 232 was held on November 3, 1945, at which time

the petitioners submitted to the membership a new method of pressure devised and recommended by Petitioner Doria. The proposed new plan had previously been discussed with officers of other labor organizations who "did not think it could be done" (R. 47).

The advantages of such new procedure were pointed out to the members (R. 47-48). Petitioner Doria, speaking for Local 232, publicly announced that the procedure "would avoid * * * the hardships which a strike imposes on the workers" and that it was deemed "a better weapon than a strike" (R. 87).

The plan of the petitioners called upon the employees to absent themselves from work repeatedly during scheduled working hours, for a few hours at a time, without giving advance notice to the company.

The plan as recommended was adopted. During the period from November 6, 1945 to March 22, 1946 the petitioners called upon the employees so to absent themselves 27 times (R. 36-37).

No reason was given to the employer for the absences until after several of them had occurred (R. 37, 48). After several of the absences, the employer was told that their purpose was to attend union meetings (R. 37). Some time later, the employer was told during bargaining negotiations that the absences were spontaneous on the part of the employees, and not the result of action by petitioners (R. 37). Even later, the petitioners told the employer that it could be "very instrumental in avoiding these meetings if they would quit starting rumors intended to undermine the union" (R. 49). The petitioners never informed the employer upon what specific demands the absences were

predicated nor what action would have to be taken by the employer to avoid them.

Not until the hearing before the state board on March 26, 1946, more than four months after the tactics were adopted, were the real purposes and objectives of the absences disclosed. The petitioners' representative, who devised the tactics, then admitted that the real purpose of the procedure was to interfere with production so as to exercise economic pressure upon the employer (R. 47, 49); and that the plan was "to be able to have such control" that when anything happened which was deemed detrimental, the petitioners "would be in a position to bring the members together to counteract" (R. 48). It was pointed out that "the so-called pressure in negotiations" was one important feature of the program (R. 49-50) and that the device was to be used upon "any development in direct negotiations with management" and "* * * any time the leaderships feel management has started a rumor detrimental to the union's security" (R. 87-88). It was one of the features of the plan not "to notify the company in advance" of any absence (R. 48).

One of the advantages asserted by the petitioners for this procedure over the strike is that "it keeps the worker on the payroll" (R. 87). Petitioner Doria asserted at the hearing that the work-time stoppage is "as old as the strike itself," but "the continued use of this is a new feature" (R. 47).

In addition to the advantages that "it keeps the worker on the payroll" and avoids "the hardships which a strike imposes upon the workers," the petitioners asserted that "a fourth advantage * * * is the fact that it puts the company completely on the defensive" (R. 88), and that:

"The meetings are called without warning, and take the company by surprise. They find it difficult to make commitments or plan production" (R. 88).

"This can't be said for the strike. After the initial surprise or walkout the company knows what to do and plans accordingly. * * *" (R. 88).

The employer took the position that production could not be continued unless it knew during what hours it might operate (R. 44).

In addition to the program of absences, the petitioners, without notifying the company, also directed workers not to report for work on Saturdays (R. 38-39) although the employer had issued notice that work was to be scheduled on Saturdays, at overtime pay (R. 38). After failing to report for a number of Saturdays, half the employees turned up one Saturday (R. 39), again without notice to the employer so as to enable it to have materials ready. Following that occurrence, the employer posted a notice which said that in view of the difficulty in scheduling work when there were unexpected stoppages, Saturday work would not be scheduled in any week in which there had been a work stoppage (R. 39).

Some employees were threatened with damage or injury if they did not join the petitioners' program of absences, and considerable damage was actually inflicted. Many employees who did not desire to take part in the program were induced to do so by booing, heckling and threats (R. 40, 50, 51, 53-54, 55, 56-58, 59, 60-61, 62-63, 64-65, 68-69, 70, 75).

In retrospect, the petitioners assert that the objectives of the proceedings were specific, but at no time during

the program were specific objectives communicated to the employer.

The petitioners have stated in their brief that one of the objectives of the program was to compel the employer to conform to a War Labor Board directive. The record establishes such a statement to be without base in fact, because the pressure program was commenced on November 3rd, while proceedings were *pending* before the War Labor Board, and no directive was served upon the employer until January 17, 1946, more than two months after the program had begun (R. 34). By that time the War Labor Board had been abolished by presidential order (Order 9672, 11 Fed. Reg. 221), so that AT NO TIME DURING THE CONCERTED ABSENCES HERE INVOLVED WAS A DIRECTIVE OF THE WAR LABOR BOARD IN EFFECT. When the directive finally reached the company, it included provisions for maintenance of membership and check-off (R. 43) which the employer could not validly have agreed to because they had not been validated as required by state law.*

The objective of the program used by Local 232 is not decisive of this proceeding, except that the several changes in position of the petitioners in that respect illustrate that one of the elements of the program is to avoid commitment as to the objectives sought and thus to prevent their evaluation. One of the important features of the program is that it does not commit the actors to a specific demand but

---

*(The Wisconsin Supreme Court recognized that a directive of the War Labor Board in time of war "supplants and operates to suspend state action in regard to the same subject matter." During the life of a War Labor Board directive, therefore, demands for maintenance of membership and check-off provisions in a contract pursuant to such a directive would have been recognized by this state as valid, irrespective of compliance with conditions imposed by state law; but after the War Labor Board's power was disestablished that was, of course, no longer true.)

leaves them free to shift from one objective to another without notice.

The state board found that the purpose of the petitioners was to compel the employer to accede to demands of the union, but it did not, and could not, have found *what* demands; because the position of the union was still shifting in that respect even at the time of the hearing several months after the program was undertaken. The tenor of the state board's finding is that it was the purpose of the union to exercise pressure upon the employer to agree to any demands that might be made in the course of collective bargaining either before, during, or after the program of concerted absences was commenced. The record shows that bargaining was continuing and that new demands were being made during the course of the program, and that some of the demands were being granted and put into effect during that period (R. 35, 41-42).

SUMMARY OF ARGUMENT

I.

CONGRESS DID NOT INTEND BY THE NATIONAL LABOR RELATIONS ACT OR THE LABOR-MANAGEMENT RELATIONS ACT, 1947, TO PRECLUDE ALL REGULATION OF LABOR RELATIONS BY STATES

A. The state board does not deny the *power* of Congress to regulate labor relations so as to pre-empt the field and exclude states. It contends only that Congress did not manifest an intent in either the National Labor Relations Act or the Labor-Management Relations Act, 1947, to preclude states from enacting supplementary regulations with respect to intrastate enterprises such as manufacturing, even though the operations of such enterprises are such as to warrant a finding by the National Board that an unfair practice would tend to obstruct commerce.

B. Congress has made different provision with respect to unfair practices occurring "in commerce," and those occurring in intrastate enterprise which are brought within the scope of federal regulation because they "affect" commerce. With respect to the latter type of practices, Congress has not made the federal legislation automatically applicable, but it applies in a particular case only if the National Labor Relations Board has found as a fact that the particular practice would tend to obstruct commerce.

C. Congress did not intend labor relations of intrastate enterprises to be immune from all regulation in cases in which the National Board is unable or unwilling to act.

D. Congress has legislated with respect to a limited

number of practices; it did not intend to preclude supplementary regulation by states as to other practices.

II.

THE STATE ACTION IS IN FURTHERANCE OF FEDERAL POLICY RATHER THAN IN CONFLICT WITH IT

A. The type of coercive program which the state action prevents petitioners from instigating is not among the activities which Congress seeks to protect.

B. The activities of the petitioners were in derogation, rather than in furtherance, of the federal policy to encourage collective bargaining; because one of the elements of the program is to exercise coercion without specifying the objectives. This phase of the program enabled the petitioners to avoid responsibility for purposes which were not legitimate.

C. The program is a variation of the sit-down strike in that it seeks to prevent any use of the productive facilities. It seeks to accomplish the same degree of coercion, but to evade the classification of the sit-down strike. The activities did not involve even a temporary relinquishment of employment, but an assertion of the privilege to interrupt the work schedule at will without interrupting the continuity of the employment.

III.

THE STATE ACTION DOES NOT IMPOSE INVOLUNTARY SERVITUDE, NOR DENY FREEDOM OF SPEECH OR ASSEMBLY

A. The order of the state board does not prevent quitting work either singly or in a body. It does not forbid attendance at meetings. It prohibits only the inducement of a newly devised type of coercive tactic in which no single element is prohibited unless it occurs in combination with all the others to form the totality of the program actually followed.

B. The restrictions imposed by the constitution upon state power in this respect can be no greater than those imposed upon Congress by the first ten amendments. Congressional action imposing far broader restrictions than those here involved has been upheld.

IV.

THE PROVISION OF THE STATE LAW RELATING TO STRIKE VOTES IS NOT INVOLVED IN THIS CASE

The provisions of Sec. 111.06 (2) (e) of the Wisconsin statutes are not involved in this proceeding because no remedy was ordered for the failure to conduct a secret ballot upon a strike. The reason why failure to conduct a secret ballot may not furnish ground for remedial action is that the sole consequence of such failure, under the interpretation given the statute by the state court, is that the participants may not then claim the benefit of certain priv-

ileges extended to strikers by other sections of the Wisconsin statutes.

ARGUMENT

I.

THE ORDER OF THE STATE BOARD DOES NOT VIOLATE ART. I, SEC. 8 OF THE CONSTITUTION CONFERRING UPON CONGRESS THE POWER TO REGULATE COMMERCE AMONG THE STATES

The petitioners have argued first that the state action was in direct conflict with Congressional legislation, and secondly that the whole subject matter is beyond the jurisdiction of states. It seems to this respondent that the latter question ought logically to be settled first before there is even occasion for consideration of the other. We are, therefore, covering under this heading the subject matter considered under the first and second headings of the petitioners' brief, but in reverse order.

At the outset, we desire to make it clear that the respondents do not here contend that it would be beyond the *power* of Congress to pre-empt the field of labor-relations regulation so as to oust states of all jurisdiction in such field, even as to intrastate enterprise; neither do the respondents contend in the presentation of this case that there is *any* field of enterprise with respect to which state power supersedes that which Congress has conferred upon the National Labor Relations Board. That is true even with respect to such traditionally intrastate ventures as the

corner grocery, because the respondent recognizes that there is no enterprise so local in character that facts cannot be shown to warrant a finding that it has an "effect" upon interstate commerce.

The Wisconsin Supreme Court has laid down a guiding rule for its state agencies in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board,* (1941) 237 Wis. 164, 179, 295 N. W. 791 (affirmed in 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942)), and that rule is followed without variation. The State Supreme Court said:

> "* * * To the extent that the orders of the National Labor Relations Board apply in a particular controversy, the jurisdiction of state authorities, both administrative and judicial, is ousted. When under the facts of a particular case interstate commerce is substantially affected and the National Labor Relations Board takes jurisdiction, its determinations are final and conclusive, the determination of any state authority to the contrary notwithstanding."

The state board follows that principle meticulously. It dismisses *any* proceeding before it if it is shown that the National Board has taken jurisdiction over the same subject matter, irrespective of what action may be taken by the National Board. See in illustration the order of the state board issued May 21, 1948 *In the Matter of the Petition of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O. for Determination of Bargaining Representatives for Employes of Kearney & Trecker Corporation,* Case II, No. 1994 E-725, Decision No. 1336, in which the state board dismissed a petition for the conduct of an election to determine a bargaining representative, because it was shown that the Na-

tional Board had conducted an election several years earlier among the same group of employees.

Secondly, the respondents do not assert the authority to act in such a manner as to defeat any *substantive* provision of an act of Congress governing labor relations, even though jurisdiction in the particular case has never been assumed by the National Board. As an illustration, see the order of the state board issued on August 21, 1948 *In the Matter of the Petition of United Steel Workers of America*, C. I. O. for Determination of Bargaining Representatives for Employes of Crown Can Company, Case I, No. 2195, E-769, Decision No. 1738-A, 22 L. R. R. M. 1369 in which the state board dismissed a petition to conduct an election for a bargaining representative where the petition was filed by a labor organization which had not complied with the provisions of federal law relating to the filing of financial statements and non-communist affidavits.

To summarize: (1) The respondent board does not claim the right to act in any case in which a national agency has assumed jurisdiction of the same subject matter. (2) This respondent does not claim the right to act in such a manner as to defeat a substantive policy of federal legislation.

To state the position affirmatively: The respondent board believes it has the duty, in line with the principle of a coordinate federal-state system of government, to act with respect to labor controversies arising within its borders where federal agencies either cannot, or do not desire to, deal with such controversy; and then to deal with such controversies in a manner not repugnant to federal policy.

The respondents do not in this case, nor in any other, seek to impose their services unsolicited. They act within

the narrow boundaries above described only when their services are sought by some petitioner who needs relief.

A. Congress has not Pre-empted the Entire Field of Labor Relations so as to Prohibit the Type of State Action Involved in this Case

While there is probably no enterprise of such a nature that there would not be circumstances warranting a finding that its operation "affects" commerce, there are many controversies to which federal legislation is, as a matter of practice, never applied. Such controversies, indeed, probably far exceed in number the ones to which federal legislation is applied, either because of limitations of policy or limitations of facilities resulting from lack of appropriations.

The United States Supreme Court has held that the National Labor Relations Act, 49 Stats. 449, 450, 29 U. S. C. A. secs. 151-166, could not be applied to any specific case except through the machinery supplied by the Act, i.e., action of the National Labor Relations Board. See *Amalgamated Utility Workers v. Consol. Edison Co.*, (1940) 309 U. S. 261, 84 L. ed. 738, 60 S. Ct. 561. The same must be true of the Labor-Management Relations Act, 1947, 61 Stat. 136 et seq., 29 U. S. C. A. Supp. secs. 141-197, because the enforcement provisions are the same.

There are a number of prerequisites to the application of the unfair practice provisions of the federal act.

First, Congress provided that the National Labor Relations Act and its successor, the Labor-Management Relations Act, 1947, can be applied to an unfair practice only upon a finding by the National Labor Relations Board, upon the basis of facts shown in the specific case, that the par-

ticular unfair practice affects commerce. While there are some provisions of the Labor-Management Relations Act, 1947, which are made applicable to *industries* affecting commerce (See 61 Stat. 156; 29 U. S. C. A. Supp. secs. 185(2)(b) for instance, relating to conciliation of labor disputes), that is not true with respect to unfair practices. One of the jurisdictional prerequisites which Congress has fixed as to unfair practices is that the National Board must find on the facts before it that the particular unfair practice affects commerce.

Second, the National Board may not move at all on its own initiative, but must await the filing of an unfair practice charge. There are many cases where the person injured by an unfair practice does not have the knowledge nor the means to apply for help to the national agency, but is able to apply to a more accessible local agency.

Third, even where application is made for the services of the National Board, and it finds that the particular matter affects commerce, it does not, and need not, always accept jurisdiction. As pointed out in *National L. R. Board v. Indiana & Michigan Elec. Co.*, (1943) 318 U. S. 9, 63 S. Ct. 394, 400, 87 L. ed. 579:

> "* * * It is not required by the statute to move on every charge; it is merely enabled to do so. * * *"

The discretion to decline to act is sometimes exercised on the basis that the extent of the affect of a particular unfair practice is not so great as to warrant the use of the overtaxed facilities of the National Board. An illustration of such a case is the order issued by the National Board on July 30, 1948 in *Sta-Kleen Bakery, Inc.*, 78 N. L. R. B. 94, 22 L. R. R. M. 1257, in which the National Board de-

clined to exercise its jurisdiction although it found that 70% of the employer's supplies came to it from another state.

The controversy which was the basis of the state action under review in the instant case arose in intrastate commerce, and the enterprise in which it arose was an intrastate business. The United States Supreme Court decided in *A. L. A. Schechter Poultry Corporation v. United States*, (1935) 295 U. S. 495, 546 et seq., 55 S. Ct. 837, 850 et seq., 79 L. ed. 1570, 97 A. L. R. 947, and in *Carter v. Carter Coal Co.*, (1935) 298 U. S. 238, 303 et seq., 56 S. Ct. 855, 80 L. ed. 1160, and in the many cases cited therein, that manufacturing and processing within the confines of a state are intrastate business even though the manufacturer or processor receives his supplies from other states and even though his products are intended for sale and consumption in other states.*

We do not raise this point in order to assert that Congress could not, if it chose, legislate to preclude states from acting, even in connection with such intrastate industries; but only to substantiate our contentions that as to unfair practices arising in intrastate commerce, as distinct from those actually arising in interstate commerce, Congress did not *intend* to preclude injured persons from having any relief at all where federal facilities are not made available. We do not believe that Congress intended that coercive tactics should as a matter of law be exempt from all restriction in such cases, especially tactics which have the practical effect of defeating collective bargaining.

---

*While these cases have been modified insofar as they delimit Congressional power, we take it they still represent the standards for determining what is "commerce."

The United States Supreme Court recognized in *Consolidated Edison Co. v. National Labor Relations Bd.*, (1938) 305 U. S. 197, 222, 223, 83 L. ed. 126, 59 S. Ct. 206, 214, that Congress contemplated supplementary state regulation. The court said:

> "* * * And whether or not particular action in the conduct of intrastate enterprises does affect that commerce is such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise. *Id.*, see, also, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466, 467. * * *
>
> "* * *
>
> "* * * But it is also true that where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances *including the bearing and effect of any protective action to the same end already taken under state authority.* * * *" (Emphasis supplied)

The case of *Bethlehem Steel Co. v. New York Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 1030, 91 L. ed. 1234, is the strongest authority which could be cited for the contention that Congress has precluded state action. That case recognizes a number of circumstances in which Congress indicated an intent to leave room for sup-

plemental state action in the field of labor relations. They are:

1. "* * * It [the National Labor Relations Act] has dealt with the subject or relationship [of employer and employee] but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent. * * *."

2. "* * * where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. * * *"

3. "* * * when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulations of its subject * * * or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter by the federal statute and the federal agency has not acted on that segment; the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation. * * * The states are in those cases permitted to use their police power in the interval."

4. The Supreme Court did not pass in the Bethlehem Steel case upon the right of the states to act in matters in which the National Board might elect "to decline jurisdiction * * * for budgetary or other reasons."

The facts in the instant case are wholly different from those in the *Bethlehem Steel case*, so that the result there reached does not furnish authority to indicate that the type of action taken by the state in the instant case is objectionable. We believe that the action here involved falls within the fields recognized by Congress as appropriate for consistent supplementary state action under the foregoing rules.

The tactics dealt with by the state in this case are not covered by federal statute. As the petitioners pointed out, it was an "experiment" (R. 48), which officers of other labor organizations "did not think * * * could be done." Since the tactics were new, Congress had had no occasion to consider or deal with them. The circumstances illustrate one of the functions of our dual form of government in which states furnish the laboratories for pragmatic regulation so that when the time is ripe for regulation on a national scale Congress may have the benefit of their experience.

The authority of the National Labor Relations Board to deal with unfair practices is expressly limited by Congress, and made exclusive, only as to unfair labor practice "listed in sec. 8" of the Federal act, title I, sec. 10a, 29 U. S. C. A. Supp. 160. That leaves an implication that Congress intended states to have the power and authority to deal with other types of conduct which might be found objectionable, so long as the state does not deal with such matters in a manner to stand "as an obstacle to the accomplishment * * * of the full purposes and objectives of Congress." (The latter phase of the discussion will be dealt with under the succeeding heading.) The practices in this case fall within the classification described in the *Bethle-*

hem Steel case as to which the rule is "conduct over which no direct or delegated federal power was exerted by the National Labor Relations Act is left open to regulation by the state."

The petitioners have asserted at page 50 of their brief that Congress has "made clear its intention to pre-empt the field of unfair labor practices * * *" with the possible exception of the ordinary police power of the state." *Whatever* a state may do in the field of regulating tactics in labor disputes is necessarily in the exercise of its "ordinary police power." If Congress intended the states to have any power in that field at all, the dividing line must be at the place where Congress delimited and circumscribed its own prohibitions, not at some other point which is indefinable or unascertainable on the basis of any standard fixed by Congress.

The Wisconsin law, for instance, classifies as an unfair practice certain types of mass picketing which "obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel." Does the fact that these tactics are designated as *unfair practices* place them in a field precluded by Congress? From the language Congress has used the line of demarcation is at the point where it stopped its own regulation—unless it be deemed that Congress intended to stamp the term *unfair practice* with a sort of trademark reserving the exclusive right to its use.

The petitioners have called attention at page 52 of their brief to specified provisions of the federal legislation and of Wisconsin statutes, which are asserted to involve variances. We do not believe there is any irreconcilable

difference in any of the provisions, but will not here enlarge upon the reasons because, as this court pointed out in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 747-748, 62 S. Ct. 820, 86 L. ed. 1154:

> "We are not under the necessity of treating the state Act as an inseparable whole. * * * Rather, we must read the state Act, for purposes of the present case, as though it contained only those provisions which authorize the state Board to enter orders of the specific type here involved. That Act contains a broad severability clause. The Wisconsin Supreme Court seems to have been liberal in interpreting such clauses so as to separate valid from void provisions of statutes. Aside from that, Wisconsin in this case has in fact applied only a few of the many provisions of its Act to appellants. And we have the word of the Wisconsin Supreme Court that 'the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order.' * * * That construction is conclusive here. * * * Hence we need not speculate as to whether the portions of the statute on which the order rests are so intertwined with the others that the various provisions of the state Act must be considered as inseparable. Since Wisconsin has enforced an order based only on one part of the Act, we must consider that portion exactly as Wisconsin has treated it—'complete in itself and capable of standing alone.' * * *"

The petitioners also complain that unless we dispose of this case by assuming that Congress has precluded state legislation entirely, employers and employees will have to "guess" which of 49 sets of rules govern. It is our Constitution which has set up a dual system of federal and

state government and for generations citizens have been accustomed to manage their affairs so as to conform both to federal law and the law of the forum in which they act. Only in the case where one law requires something that is forbidden by the other does a difficulty arise. That is not the case here. The argument that a citizen should not be subject to more than one set of laws is an argument against the federal system of government which is provided for in the constitution. The argument seems anomalous in urging that a law should be invalidated under the same constitution.

It remains only to determine whether regulation of the tactics here involved stands as an obstacle to the accomplishment of any of the purposes or objectives of the Labor-Management Relations Act, 1947.

B. The Order of the State Board does not Deprive the Petitioners of any Right Guaranteed to them by Congressional Enactment

(1) The restrained tactics are not protected by sec. 7 of the National Labor Relations Act, nor the corresponding provisions of the Labor-Management Relations Act, 1947

The petitioners urge that the order of the Wisconsin board attempts to deprive them of rights guaranteed to them under the National Labor Relations Act and under its successor, the Labor-Management Relations Act, 1947, so that the state action is invalid under the rule of *Hill v. State of Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782.

The restriction in the instant case is, of course, a far cry from that involved in *Hill v. State of Florida, supra,* where there was involved legislation of general application affecting interstate and intrastate enterprises alike, and under which an injunction was issued restraining a labor organization from functioning at all, even in behalf of employees of a firm actually "engaged in" interstate commerce. The restraint here, on the contrary, does not prohibit collective bargaining, but is directed against a tactic seeking to defeat bargaining and to substitute unilateral control. The order of the state board, as construed, is narrowly adjusted to prevent only the *instigation* of the particular type of concerted coercive activity here involved. The challenge to the validity of the order calls for a determination whether Congress intended to guarantee to the petitioners the right to do what they did in this case.

Sec. 7 of the National Labor Relations Act, 49 Stat. 452, 29 U. S. C. A. sec. 157, stated that employees should have the right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." The Labor-Management Relations Act, 1947, repeated that provision in the same words and added that employees should also have the right to refrain from such activities. 61 Stat. 140, 29 U. S. C. A. Supp. sec. 157.

Assuming that Congress intended to prohibit states from regulation of such activities as are described in the foregoing provision, the question to be determined is the nature and extent of the activities included. The Labor-Management Relations Act, 1947, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." 61 Stat. 140, 29 U. S. C. A. Supp. sec. 158.

It follows logically that if the tactics are of a kind which Congress has withdrawn from state regulation by implication, the same tactics are protected by the foregoing express provision against any interference or discipline by management.

The United States Supreme Court commented in *Amalgamated Utility Workers v. Consol. Edison Co.*, (1940) 309 U. S. 261, 263, 84 L. ed. 738, 60 S. Ct. 561, that sec. 7 did not create new rights but was merely definitive of the rights which existed at the time of the enactment of the National Labor Relations Act. Since the tactics here involved are recognized by the actors themselves as "new," "experimental" tactics devised since the enactment of sec. 7, it follows that Congress could not have had such specific activities in mind when it framed its protective guaranty.

Cases decided by the United States Supreme Court establish that the provisions of the federal statute above quoted do not make immune from state regulation or from employer discipline *all* concerted activities of individuals purporting to act in behalf of employees, even when such activities are undertaken for mutual aid or protection.

It was held in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board*, (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154 that federal statutes do not guarantee the right to engage in mass picketing, to picket employees' domiciles, or to threaten employees who desire to work (the latter of which is one of the prohibitions imposed in the instant case), although it was clear that such activities were "concerted" and were undertaken for "mutual aid or protection."

It was held in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706 that

the federal statutes do not guarantee the right to engage in any concerted activities involving violence.

It was held in *National Labor Relations Board v. Fansteel M. Corp.*, (1939) 306 U. S. 240, 83 L. ed. 627, 59 S. Ct. 490, 496, that Congress did not intend to include sit-down strikes within the concerted activities recognized in the National Labor Relations Act. The court there said that section 13 of the National Labor Relations Act, which provides that nothing in the act "shall be construed so as to interfere with or impede or diminish in any way the right to strike" contemplates "a lawful strike,—the exercise of the unquestioned right to quit work." It was there held that a strike illegal in its inception and prosecution was not the exercise of "the right to strike" to which the act referred. The court went on to say:

> "It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful."

Generally speaking, the court defined the type of activities which were intended to be recognized and protected by the National Labor Relations Act in the following words:

> "* * * Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion."

In *National Labor Relations Bd. v. Sands Mfg. Co.*, (1939) 306 U. S. 332, 83 L. ed. 682, 59 S. Ct. 508, the United States Supreme Court held that conduct in violation of a contract was not the type of concerted activity with which

an employer is prohibited by federal legislation from interfering.

The Circuit Court of Appeals for the Fourth Circuit held in *National Labor Relations Board v. Draper Corporation*, (1944) 145 F. 2d 199, that Congress did not intend to include within whatever protection it accorded to concerted activities such conduct as a "wildcat" strike, pursued in violation of contract and in violation of purposes of the National Labor Relations Act. The court made the following pertinent comment: (loc. cit. 145 F. 2d 202-203):

> "The question is narrowed, then, to whether what was done amounts to an unfair labor practice within section 8 (1) of the act. This depends on whether or not the 'wild cat' strike, in which the discharged employees were engaged, falls within the protection of section 7 of the act. If it does, a discharge on account thereof would clearly be interference and coercion with respect thereto within the meaning of section 8 (1).
> * * *
>
> "* * * we are of opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act, but a strike in violation of the purposes of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees. *The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace.* * * *" (Emphasis supplied)

In *Southern S. S. Co. v. National Labor Relations Board*, (1942) 316 U. S. 31, 62 S. Ct. 886, 86 L. ed. 1246, there was held invalid an order of the National Labor Relations Board to the effect that a strike aboard ship was protected by the law against disciplinary action by the employer. The United States Supreme Court held that, since such a strike was made unlawful by the Criminal Code, it was not the type of concerted activity which Congress intended to protect by the guarantee contained in the National Labor Relations Act.

The National Labor Relations Board also recognized that there are types of concerted activities which are not protected by the National Labor Relations Act and its successor. For a recent example, see *Fontaine Converting Works, Inc.*, 22 LRRM 1149, 77 NLRB #216. It was there held by the National Board that concerted activities undertaken in behalf of another, and not for the employees' advancement or protection, were not of a character protected by the National Labor Relations Act. See, also, *International Longshoremen's Union*, 22 L. R. R. M. 1001, October 25, 1948, in which it was held that concerted activities are not protected when they infringe upon the rights of others to refrain from such activities. The board pointed out that the right to refrain from concerted activities which is guaranteed by federal legislation includes the right "to go to and from work without restraint or coercion while a strike is in progress."

Even in one of the early cases cited by the petitioners, *Harnischfeger Corporation*, 9 N. L. R. B. 676, the National Board quoted sec. 7 of the National Labor Relations Act relating to rights of employees and said:

"* * * We do not interpret this to mean that it is unlawful for an employer to discharge an employee for any activity sanctioned by a union or otherwise in the nature of collective activity. * * *"

It is clear, then, that Congress did not intend to place beyond state regulation, and beyond protective action by an employer *all* concerted activities. Generally speaking, the type of activities for which an employer may not impose discipline (and as to which state regulation might be said to be contrary to the objectives of the federal law) are such activities as look toward collective bargaining "without restraint or coercion" on either side. It was not the intent of Congress that persons acting purportedly for employees' groups should be authorized to use *any* type of tactics which they might choose. Presumably Congress intended whatever guarantee it gave to extend only to the type of activities which were recognized as lawful at the time of the enactment.

There are few authorities dealing with the exact tactics utilized in this case, probably for the reason that the tactics are, as recognized by the petitioners, new. In the only case in which the type of tactics now before the court were passed upon by a federal court, *C. G. Conn, Limited v. National Labor Relations Board*, (1939) 108 F. 2d 390, it was held that such tactics were not within the protective scope of the National Labor Relations Act. The court said: (loc. cit. 108 F. 2d 397):

"* * * Undoubtedly, when petitioner refused to comply with their [the employees'] request, there were two courses open. First, they could continue work, and negotiate further with the petitioner, or, second, they could strike in protest. They did

neither, or perhaps it would be more accurate to say they attempted to do both at the same time. We have observed numerous variations of the recognized legitimate strike, such as the 'sitdown' and 'slow-down' strikes. It seems this might be properly designated as a strike on the installment plan.

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment."

The petitioners have suggested that the *Conn case, supra*, is distinguishable from the case at bar because there the employees refused to work overtime, whereas here the absences were in part during hours scheduled as regular time. It would seem an illogical distinction if a court were to hold that refusal to work *overtime* is an activity unprotected by Congress, for which an employer might discipline, but that he could not impose discipline for refusal to work during *regularly scheduled hours*. If anything, the distinction would militate in favor of the validity of the restraint here involved; because surely a refusal to work *overtime* is a lesser interference with functions of management than a refusal to work during regular hours. In any event, the plan put into operation in the instant case by the petitioners did include refusal to

permit employees to work on Saturday mornings which were scheduled working hours at overtime pay. The petitioners urge that the state board did not rely for its order upon the refusal of the petitioners to permit Saturday work. The board based its order, of course, upon the totality of the entire program, and not upon its separate elements.

The other distinction petitioners seek to make for the *Conn case* is that the objective of the tactics was different. That distinction, too, operates in favor of the contentions of the state board in the instant case. In the *Conn case*, there was no question that the exact objectives of the employees were made known, and that they were legitimate. In the instant case, the petitioners had made illegal demands, and then declined during their coercive program to commit themselves to any definite objective, thus reserving to themselves the right later to disown the objectionable parts of earlier demands.

The National Board was a party to the *Conn case;* and having accepted the result it has presumably adjusted its policies to accord with the precedent. Earlier decisions of the board cited by the petitioners can carry no weight in the light of this case, if they are contrary to its holding.

The petitioners have endeavored to show that each component *part* of their program, considered separately, was unobjectionable. See pages 21 and 42 of their brief where it is said that neither the nature of the activities nor their purpose is objectionable. This assertion we deem incorrect; but even if it were true, that would not establish that the combination was necessarily unobjectionable. Such a conclusion is no more sound than to say that payment of a bribe to a public officer is unobjectionable on the ground that neither an attempt to influence him nor the payment

of money to him, if considered separately, is wrongful. It is the combination of circumstances which is sought to be prevented, not any single component part. The conduct must be judged by its totality, as this court said of the conduct involved in *National Labor Relations Bd. v. Virginia Electric & P. Co.*, (1941) 314 U. S. 469, 86 L. ed. 348, 62 S. Ct. 344. The court there held that the "total activities" were to be considered, rather than the effect the component words or acts might have had in isolation.

Even if we were to consider separately the methods and objective of the tactics here involved, neither is innocuous. The petitioners have iterated, and reiterated, in their brief that one objective was to compel the employer to conform to a War Labor Board directive. A directive which was admittedly not received by the petitioners until December 31, 1945 and not served upon the employer until January 17, 1946 could not have been the objective of a program adopted two months earlier, on November 3, 1945. The claim is an afterthought which serves chiefly to illustrate that an essential part of the plan was to avoid being committed upon the objective. When the directive of the War Labor Board finally reached the employer it included two items with which the employer could not then legally comply because of lack of compliance with conditions of state law (similar to the conditions in the Labor-Management Relations Act, 1947, with respect to compulsory unionism and check-off of dues), and because the War Labor Board had by then been abolished so that a directive by it no longer operated to suspend requirements of state law. The state board could not base its order on illegality of purpose, because the petitioners had declined to commit themselves as to their objectives until the hearing before the

board—and even then their position shifted on the questions of maintenance-of-membership and 'check-off.

The means of pressure, likewise, involves many elements which are objectionable from the point of view of public interest. These are analyzed in later discussion. The method was recognized by the petitioners, who are experienced leaders, as a new device of their own, and they stated other leaders did not think it "could be done." This would seem to establish that the tactic was not one of the traditional, established weapons as is now claimed.

Of the forms of concerted activity known to Congress at the time of the enactment of the National Labor Relations Act, the one most nearly analogous to that involved in the instant case is probably the sit-down strike. Under the tactics now before the court the employees retain control over the means of production. They do not relinquish the employment so that the means of production may be utilized by other persons who might be desirous of working. In the ordinary form of strike, the employer may engage other employees to carry on production. The means of production are left free. Under the method now in question, one of the chief advantages from the petitioners' point of view is that almost the entire sacrifice is shifted to others. An essential of the plan is continuous retention of the employment with the privilege of directing employees to be absent without notice, and without permission of management, as frequently as the petitioners choose. Under such a plan the productive equipment is under their control, so that it can not be used except when the petitioners are willing.

By the recognition of the rights of employees contained in sec. 7 of Title I of the Labor-Management Relations

Act, 1947, 61 Stat. 140, 29 U. S. C. A. Supp. sec. 157, Congress did not intend to bestow upon third parties an inalienable right to instigate employees to engage in unfair or unlawful concerted activities which would have the ultimate result of interfering with production and obstructing the flow of commerce. That is shown by the Congressional findings and declaration of policies contained in sec. 1 of Title I of the Act, (61 Stat. 136, 29 U. S. C. A. Supp. sec. 151) to the effect that:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members *have the intent or the necessary effect of burdening* or obstructing *commerce* by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or *through concerted activities which impair the interest of the public* in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." (Emphasis supplied)

By the above declaration Congress has shown that it did not intend either to protect or to encourage the kind of concerted activities "which impair the interest of the public in the free flow of commerce."

The restraint involved in the attacked portion of the Wisconsin Board's order does not apply to individual employee participation in any type of activity. (The only portion of the Wisconsin order which applies to individual employee participation is the portion which is not here under attack, preventing coercion or intimidation of other employees to join in the program by threat of violence or punishment.) The restraint under attack prohibits only

the inducement of the concerted tactics described. The ultimate question, then, is whether Congress intended to guarantee to third parties the right to "induce" employees, without even temporarily relinquishing their employment, to absent themselves from work repeatedly for short periods of time, without notice and without permission, for the purpose of exercising economic pressure by interference with production.

The practical objective of the activities is to enable the employees' representatives to assume one of the chief functions of management by deciding when the employees should be excused from duty and when they should return. *If such activities are within the scope of sec. 7 of the Labor-Management Relations Act, 1947, management is prevented by law from interfering with them, or from taking any steps to discourage them.*

The petitioners have stated that it would be an anomoly if the state could prevent activities for which the employer might not impose discipline (see pages 25, 39 of petitioners' brief). We are disposed to agree. It is, however, our contention that Congress did not intend this particular type of tactic to be made immune from either regulation by the state or discipline by management. The petitioners have urged that this situation places the respondent board on the horns of a dilemma: that both the state and management are precluded by Congress from interfering with this tactic, or else the employer is at liberty to discharge and there is no need for governmental regulation. The latter conclusion is not only a *non sequitur* but is wholly irrelevant to constitutional considerations. It is a *non sequitur*, because the fact that individuals have a right to defend themselves from unwarranted aggression has never

been recognized as a reason why a government should not act in the interests of public peace to prevent the aggression, in the first instance. The state law seeks to substitute the "processes of justice" for "trial by combat" (Sec. 111.01 (4), Wisconsin Statutes), and thus to avoid the infliction upon the public of the results of the bitterness entailed in leaving all disputes to settlement by retaliatory methods.

Secondly, it is our understanding that whether there is a *need* for legislation presents a matter of policy for the law-making body rather than a constitutional question.

Both the Wisconsin Employment Peace Act, and the Labor-Management Relations Act, 1947, show by their findings and declarations of policies that it was intended that labor relations should be governed by mutual responsibility on the part of both parties and that both sides should have a reciprocal obligation to subordinate the furtherance of their self-interest to the welfare of the public. Congress did not intend to legalize any conduct which is directed toward unilateral control with resultant concentration of power on either side.

It has been suggested that the interest of the public would suffer less from periodic interferences with production than from full time strikes. Such a viewpoint is concerned only with immediate effects, and disregards the inroads which in the long run would be substantially more devastating to the flow of production. The state legislature has sought to avoid practices most devastating to the ultimate flow of production. Its method of seeking that result is by establishing standards of conduct in the use of economic coercion. It has said that the strike, if lawfully exercised, is a permissible practice; but it has said that certain

other types of interruption of production, even though they may have a less extensive effect in the particular dispute, are not permissible if they involve less fair methods. A strike as heretofore recognized, involves certain bilateral elements. A weapon which would leave arbitrary power on either side might result ultimately in a far greater curtailment of production than would a strike in which both parties openly and frankly avow their respective positions.

The Wisconsin Employment Peace Act (Secs. 111.01 to 111.19 of the Wisconsin Statutes for 1947) is very similar to the Labor Management Relations Act, 1947. The same act has prevailed in Wisconsin since 1939. During part of that time the state act was substantially different from the federal legislation. It differed so substantially that it was several times asserted that the state law was invalid because of inconsistencies. During that time when the state law was sufficiently different from the federal legislation so that it might have been contended, with considerably more justification than now can be done, that the state regulation denied privileges given by the federal law, the state regulation was uniformly upheld. See *Hotel and R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706, *Allen-Bradley Local 1111 v. Wis. E. R. Board*, (1941) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, and *Christoffel v. Wis. E. R. Board*, (1943) 320 U. S. 776, 88 L. ed. 466, 54 S. Ct. 90 (certiorari denied). The objectives of state and federal legislation are the *same* under the present laws. The Wisconsin legislature has not sought to undermine, but rather to support, the national policies. Both the Labor-Management Relations Act, 1947, and the Wisconsin Employment Peace Act are directed to the common purpose of preventing industrial conflict by preventing un-

due infringement by one party to a dispute upon the rights of the other or upon the rights of the public. The Wisconsin act differs from the federal act in certain details, but not in theory. The Wisconsin legislature has not aimed to curtail any of the guaranties of the federal act but has extended further protection. The Wisconsin law imposes upon the employer the same obligations with respect to collective bargaining as does the federal act and restricts interference by employers and third parties with concerted activities of employees in almost identical terms. In administration of the act no case can be cited in which the Wisconsin board has failed to defer to the rulings of the National Labor Relations Board when the latter assumed jurisdiction.

We submit that the activities prevented by the state regulation, rather than the regulation, are contrary to the spirit of the federal law.

(2) The restrained tactics are not protected by sec. 13 of the National Labor Relations Act nor by the corresponding provisions of the Labor-Management Relations Act, 1947

The petitioners have quoted at page 31 of their brief sec. 13 of the National Labor Relations Act, 29 U. S. C. A. sec. 163, which provides that nothing "in this Act" shall be construed to interfere with the right to strike. The corresponding section of the Labor-Management Relations Act, 1947, 29 U. S. C. A. Supp. sec. 163, adds "or to affect the limitations or qualifications on that right" which demonstrates that Congress recognized that even the right to strike (which is not here involved) is not absolute.

The petitioners then quote at page 33 of their brief the definition of a strike contained in sec. 501 (2) of the Labor-Management Relations Act, 1947, 29 U. S. C. A. Supp sec. 142 (2), which includes any concerted interruption. The definition which Congress gives the term includes sit-down strikes, as well as other forms not recognized as legal. The definition was made inclusive primarily to implement the machinery provided in the act to *prevent* interruptions of production. There is nothing anywhere in the federal legislation to indicate that Congress intended to legalize *all* forms of strike activity—for example the sit-down, which is included in its definition of a strike.

Here again, we decline to be drawn into argument as to nomenclature. The Wisconsin Supreme Court has said that for purposes of applying state legislation the activities herein involved are not strikes; but the name to be applied does not necessarily settle the questions of constitutionality.

Under the most unfavorable interpretation of the state board's order, nobody could assert that it prohibits all strikes. It prevents the inducement of only one narrow form of interruption to production, the attributes of which are deemed more inimical to ultimate public welfare than those of the recognized lawful strike.

II.

THE RESTRAINT IMPOSED BY THE WISCONSIN BOARD DOES NOT DENY PETITIONERS ANY RIGHTS GUARANTEED BY THE 13th AND 14th AMENDMENTS TO THE CONSTITUTION

As pointed out by this court in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1942) 315 U. S. 437, 440-441, 86 L. ed. 946, 62 S. Ct. 706, the question whether the restraint denies rights guaranteed under the federal constitution is to be determined in the light of the construction given the restraint by the Supreme Court of Wisconsin. Quite naturally, in an endeavor to have the restraint struck down as unconstitutional, the petitioners attempt to attribute to it a far wider meaning than has been given by the courts of Wisconsin. The state supreme court has said that all the order does is to ban the petitioners from engaging in concerted efforts to interfere with production by "doing the acts instantly involved." Any potentially broader effect that might be given the language can have no bearing upon the constitutionality of the ban; because the order as construed by the court is narrow and specific. The only question is whether the constitutional guaranties respecting involuntary servitude, freedom of assembly, and freedom of speech place the specific type of conduct indulged in by the petitioners above regulation. (If the constitutional guaranties prevent regulation, they inhibit federal as well as state action in that respect.)

As pointed out by the state court, the prohibition does not apply at all to individual action, but only to inducing a concerted program of interference with production by *specific means*. The restraint applies only to the instigation

of the program of absences, and not to a mere participation in them, because it applies only to the interferences with production resulting from "inducing" the action involved. Furthermore, it does not prohibit the calling of strikes because the restraint itself expressly excepts interference resulting from a strike as that term is ordinarily understood.

The state courts held that the conduct involved did not constitute a strike or a series of strikes, and we submit that the holding in that respect was correct. Certainly, if the *intent* of the individuals instigating and participating in the conduct has any bearing, the program of absences involved in this case could not have been a strike or a series of strikes. The petitioners vigorously denied that they intended to strike during the entire period while their program was being carried out. It was only when they came into the hearing before the state board that they altered their position, solely for the purpose of claiming whatever privileges and immunities are incident to strikes.

We believe an examination of authorities throughout all jurisdictions will reveal that a strike involves at least a temporary, conditional suspension of the employment relation. A strike does not involve a severance of the employment relation as would a resignation or abandonment of the employment. All definitions of a strike, however, incorporate the element of "quitting." In the instant case there was no "quitting" and no suspension of the employment relation even for an instant.

It is not the purpose of this respondent, however, to argue whether the proper nomenclature was ascribed to the activities by the Wisconsin courts. We believe that the constitutional issues are to be determined by the substance of the thing prohibited rather than by the name applied to

it. Even if it were conceded, as desired by the petitioners, that the activities involved in this case were a form of strike, the prohibition at its broadest applies only *to that particular form* of so-called "strike." As made clear by the Wisconsin court and by the wording of the order itself, the prohibition does not apply to the activity normally recognized as a strike. It applies only to the form of activity which was described by the petitioners themselves as a "new feature" (R. 47), and an "experiment" (R. 48). For purposes of meeting the constitutional issues respecting involuntary servitude, it is immaterial whether the proscribed activity be classified as a form of a strike or as something entirely different. Wherever the question has come before the federal courts as to the constitutionality of limitations upon, restrictions of, or even prohibitions against, strikes, it has been held that the right to strike is not guaranteed by the constitution. *A fortiori* a prohibition against a particular form of stoppage is not objectionable on constitutional grounds.

In *France Packing Co. v. Dailey*, (C. C. A. 1948) 166 F. 2d 751 the Circuit Court of Appeals for the Third Circuit upheld the provision of the War Labor Disputes Act prohibiting a strike for thirty days after notice, and pointed out the reason why the provisions of the constitution relating to involuntary servitude have no bearing upon legislation regulating strikes. The court said: (loc. cit. 166 F. 2d 753, 754)

> "Support for its decision was found by the court below in the Constitutional protection against involuntary servitude; * * *.
>
> "The contention that a limitation of the right to strike under the specified narrow conditions of Sec-

tion 8 partakes of involuntary servitude is not substantiated by the cases. To the contrary, *there is a wide distinction between a worker quitting his job, for any reason or no reason, on the one hand, and a cessation of production by workers who seek to win a point from management, on the other hand.* * * *

* * *

"In brief, the restricted limitation of the right to strike, in this Act, refers to circumstances involving a continuing master and servant relationship. *There is no involvement here with the distinct—and unquestioned right of the worker to quit his job* or the right of the employer to discharge him for cause. In this situation we fail to see any true constitutional question in this case." (Emphasis supplied)

In *Dorchy v. Kansas*, (1926) 272 U. S. 306, 47 S. Ct. 86, 71 L. ed. 248 the Supreme Court of the United States upheld a statute of Kansas prohibiting, under criminal sanction, the calling of a strike. The court used the following significant words:

"* * * To enforce payment by a strike is clearly coercion. The Legislature may make such action punishable criminally * * *. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. * * *"

The petitioners have cited *Chas. Wolff Packing Co. v. Court of Industrial Relations*, (1923) 262 U. S. 522, 43 S. Ct. 630, 67 L. ed. 1103; (1925) 267 U. S. 552, 45 S. Ct. 441, 69 L. ed. 785 as authority that the Kansas law involved in the above case was unconstitutional. The only part of the

law invalidated in the *Wolff Packing Company case* was that imposing compulsory arbitration. The portion making it unlawful "to induce others to quit their employment for the purpose and with the intent to hinder, delay, limit or suspend the operation of mining" was held severable and valid as applied in the *Dorchy case.*

The case of *State ex rel. Hopkins v. Howat,* (1921) 109 Kan. 376, 25 A. L. R. 1210, 198 Pac. 686 is another in which a law restricting strikes was upheld. Writ of error was dismissed by the United States Supreme Court in *Howat v. Kansas,* (1922) 258 U. S. 181, 66 L. ed. 550, 42 S. Ct. 277.

The court has again, very recently, tacitly recognized that there is no constitutional objection to an injunction restraining a union and its officials from encouraging workers to interfere with production by strike or cessation of work. See *United States v. United Mine Workers of America,* (1947) 330 U. S. 258, 91 L. ed. 884, 67 S. Ct. 677.

The District Court of the Northern District of Illinois considered the question expressly in *Western Union Tel. Co. v. International B. of E. Workers,* (1924) 2 F. 2d 993, 994, affirmed 4th C. C. A., 6 F. 2d. 644, 46 A. L. R. 1538; certiorari denied 284 U. S. 630, 76 L. ed. 536, 52 S. Ct. 13, in which an injunction against striking was upheld against attack on constitutional grounds. The court said:

> "As to clause 1 of the prayer for a temporary injunction it is said that it prevents employees from ceasing to work, and therefore imposes involuntary servitude upon them. The right to cease work is no more an absolute right than is any other right protected by the Constitution. Broadly speaking, of course, one has the right to work for whom he will, to cease work when he wishes, and to be answerable to no one unless he has been guilty of a breach of con-

tract. But the cessation of work may be an affirmative step in an unlawful plan. One may not accept employment intending thereby to quit work when that act will enable him to perform one step in a criminal conspiracy. * * * These defendants are under no compulsion to accept employment on buildings where plaintiff's equipment is being installed; and, if they do accept it, they are not permitted to make an unlawful use of it. * * *"

We will not attempt to review the decisions of state courts dealing with the subject, not only for the reason that they would not be controlling upon this court in matters involving the federal constitution, but because the variance in approach to the question results in confusion rather than clarity. Most of the cases cited by the petitioners with respect to the right to strike do not involve constitutional questions at all. Many involve the principle of tort, to the effect that there is no liability for injury inflicted by a strike with proper justification. Others involve the policy that equity will not give specific performance of a contract for services.* Such cases, relating to policies of courts of equity,

---

*None of the cases cited at pages 57 to 59 of the petitioners' brief involves a restraint so narrow as the one challenged here and few of them involve constitutional issues at all.

Bailey v. Alabama, (1910) 219 U. S. 219, and **Pollock v. Williams,** (1944) 322 U. S. 4, involved statutes which, in effect, punished refusal to continue in the service of creditors. The instant case does not require anyone to continue in the service of another. In **Bedford Co. v. Stone Cutters Assn.,** (1927) 274 U. S. 37 the court approved an injunction against certain strike activities as a violation of the anti trust law (which was later changed to exempt union activities). Even the dissenting opinion did not imply that the injunction was unconstitutional, but urged only that the act of Congress should not be interpreted as authorizing such an injunction.

In **United States v. Hutcheson,** (1941) 312 U. S. 219 the court did not consider or even discuss the question of constitutionality. The issue was one of statutory interpretation, i.e., whether concerted activities were within the prohibition of the Sherman Act, and it was decided that the Congressional intent should be determined in the light of the enactment of the Norris-LaGuardia act. The leaning the cases have on the constitutional question of the right to strike

or liability for damages in the absence of legislation, furnish little guidance as to what may constitutionally be done by legislation.

Many of the cases have arisen in connection with the historical doubt of the right to strike at all, and pronouncement of the so-called "right to strike" have been in recognition of the particular jurisdiction's philosophy on the question of public policy in the *absence* of legislation. Writers sometimes confuse assertions of the so-called "right" to strike in such cases (which is nothing more than a recognition that such action is not unlawful in the absence of legislative proscription) with the inalienable rights guaranteed by the constitution. The mere recognition that a certain

---

is that strikes may constitutionally be prohibited and that such question is in the field of legislative policy.

The Wisconsin court did not rely upon **Aikens v. Wisconsin**, (1904) 195 U. S. 194 as asserted in petitioners' brief, except as it happened to be cited in the excerpt quoted from **Dorchy v. Kansas**, (1926) 272 U. S. 306.

Arthur v. Oakes, 63 Fed. 310 is discussed in the text. **Union Pac. R. Co. v. Ruef**, (1902) 120 Fed. 102 did not discuss legislative restriction, but referred the policy that equity will not give specific performance of a contract of service. The case applied the doctrine of conspiracy in enjoining unlawful picketing. Neither was any question of constitutionality of legislation before the court in **Iron Moulders' Union v. Allis Chalmers Co.**, (1908) 166 Fed. 45. The court dealt only with the ordinary rules of equity and held that a strike with a lawful objective was not enjoinable in the absence of legislation. **Great Northern Ry. Co. v. Brosseau**, (1923) 286 Fed. 414 dealt with the kind of injunctions which might be issued under the Clayton Act and did impose certain limitations upon the activities of strikers. It had no reference to constitutional issues.

The case of **Stapleton v. Mitchell**, (1945) 60 Fed. Supp. 51 does not hold that the right to strike may not be regulated, much less the right to interfere with production by means other than striking, but only that the right to strike may not be abridged by general enactment "in the absence of grave and immediate danger to the community."

The portion of the statute stricken down by the state court in **Ala. St. Fed. of Labor v. McAdory**, (1944) 18 So. 2d 810 was one of broad application similar to some of the provisions in the Labor Management Relations Act, 1947, which have not been held objectionable by federal courts, and it is not comparable to the narrow restraint here involved. **Hotel & Restaurant Employees, Etc. v. Greenwood**, (1947, Ala.) 30 So. 2d 686 dealt with the rule of tort that whether a strike is restrainable depends, in the absence of legislation, upon whether the objectives and the methods are lawful. The right to strike was not involved in **In re Porterfield**, (1946, Cal.) 168 P. 2d 706 but rather the right to solicit memberships. The statute considered by the state court in **Ex parte Blaney**, (1947, Cal.) 181 P. 2d 892 imposed broad general restraints which were stricken down in part because they were too vague as to the obligation imposed.

course of conduct is not unlawful in the absence of prohibition should not be translated into the proposition that the constitution protects such activity from any regulation. There is a vast difference between a right by sufferance and an inalienable right protected by the constitution.

An illustration of the rules followed by the courts in connection with labor disputes may be found in the very first of the group of cases cited by petitioners to support their contention that the right to strike is supported by the Constitution, *Arthur v. Oakes*, (1894) 63 Fed. 310, 25 L. R. A. 414. The court's decision turned upon the powers of a court of equity in the absence of legislation and in its discussion it commented that if regulation were necessary in the public interest, that was primarily a function for the legislature rather than for courts of equity.

Cohn and Roth Electric Co. v. Bricklayers' etc. Local U. No. 1, (1917) 101 Atl. 659 was not concerned with constitutional questions, but primarily with statutory interpretation. It dealt with strikes as torts and held that they did not fall within the terms of a specific statute relating to intimidation.

The case of **American Federation of Labor v. Reilly,** (1944, Cal.) 155 P. 2d 145 indicated that a law conditioning the right to strike upon a favorable vote by the majority of the employees involved would be valid if considered independently, but that the particular law was invalid because of the entanglement of such provisions with invalid ones.

The discussion from **Hendyson v. Coleman,** (1912, Fla.) 7 So. 2d 117 was not directed toward severance of the contractual employer-employee relationship by strike, but rather toward the refusal of independent contractors who were under no contractual obligation to enter upon performance of work that they did not choose to do.

The case arose upon an attempt to cite two persons for contempt for violation of an injunction; and the decision was based upon the circumstances that these two persons had nothing to do with the acts complained of. The implication is clear that if they had instigated a strike, the result would have been different.

Pickett v. Walsh, (1906 Mass.) 78 N. E. 753 is another case which dealt with striking solely in the field of tort, and did not involve regulation under the police power.

Lindsay & Co. v. Montana Federation of Labor, (1908 Mont.) 96 Pac. 127 dealt with striking solely in the field of tort, and involved no constitutional question. It represents the minority view respecting the effect of combination. See summary in Teller, **Labor Disputes and Collective Bargaining,** Vol. I, sec. 14, pp. 34-39. **National F. Ass'n. of Steam Fitters, Etc. v. Cumming,** (1902 N. Y.) 63 N. E. 369 likewise dealt with the question of tort in the absence of legislation.

The petitioners have cited a number of cases involving the equity principle that courts will not grant specific performance of contracts of employment; and have urged that there is no difference in dealing with the conduct of an individual in that respect than in dealing with the conduct of groups acting in concert. That there is a substantial difference in the coercive effect of individual and concerted action is recognized by labor organizations as the primary argument for their programs. The distinction is one which furnishes a reasonable and waranted basis for legislative classification not only in regulation affecting labor disputes but in other forms of legislation. One of the best illustrations of the fact that a thing which is unobjectionable if done independently may become subject to regulation if done in concert, is to be found in the case of *Allen Bradley Co. v. Local Union No. 3*, (1945) 325 U. S. 797, 65 S. Ct. 1533, 89 L. ed. 1939 cited by the petitioners. It was there held that what labor unions might have done lawfully by themselves became unlawful when done in combination with others.

The great majority of American jurisdictions recognize that there is a distinction between concerted and individual action which may form a basis for greater regulation with respect to the former. A good discussion appears in Teller, *Labor Disputes and Collective Bargaining*, Vol. 1, sec. 14, pages 34-39, which reads in part:

> "There is a school of thought which contends for an unlimited right to strike at common law, and a corresponding unlimited right to engage in a primary, peaceful boycott. How can combination, it is asked, change the character of an act? It is denied that mere combination can constitute criminal or tortious acts

which each member of the combination is free to do.

* * *

* * *

"The mold of American law has generally developed an apparent disregard, however, of arguments seeking to justify private collective action. American courts have generally looked askance upon the organized attempt by labor to assert an absolute right to strike. The general rule has been tersely stated in State v. Stockford to the effect that 'A strike may be lawful or it may be unlawful and criminal.' * * * The great preponderance of judicial authority holds that individually blameless acts may become illegal if done in combination. The reasons advanced to explain this disregard by the common law of that which to some courts and writers appear to be unassailable logic are varied and interesting, but in the main beside the point. * * *"

The restriction now before the court for consideration is far narrower than the ones held to be constitutional in the cases cited in this brief. For the purposes of this case it is not necessary to decide whether a legislature may impose general restrictions against striking. It is the respondent's position that it has not imposed *any* limitation upon strikes at all but has couched its prohibition narrowly to prohibit a specific type of coercive tactic which is more inimical to the ultimate public interest in the continuance of production than the strike; because of its tendency toward a unilateral concentration of power. It would seem a self-evident proposition that concentration of power in the hands of any segment or group, whose self-interests do not coincide exactly with those of the public generally, is undemocratic and unwise.

Even if it should be held that the Wisconsin Supreme Court was wrong in holding that the prohibited tactics do not fall within the classification of strikes, the restriction imposed is still far narrower than those upheld in the foregoing cases. Under no circumstances could it be construed as a blanket prohibition against striking. Under the most adverse construction which could be given it, it could be regarded as a restriction against only one *form* of "strike," which is akin to the sit-down strike in that it does not leave the means of production free for other use.

Certainly the framers of the constitutional guaranty against slavery and involuntary servitude did not have in mind the activities here involved, which the actors themselves have characterized as a "new" tactic for the exercise of concerted coercive pressure. It would doubtless surprise the people who voted for the Thirteenth Amendment to hear it urged as insuring the right to induce persons who have voluntarily accepted employment to absent themselves from work whenever they choose, without notice and without explanation, while still insisting upon the right to retain the employment and prevent others from utilizing the means of production.

Nothing in the state board's order compels anyone to continue in the service of the employer. The employees, whom the petitioners seek to control by inducing their absence from work, entered the employment voluntarily. They apparently do not wish to quit the employment but rather to continue the employment relation of their own volition, without interruption.

There is no ground for urging that there has been a violation of the due process provisions of the Fourteenth Amendment. The requirement of due process means that

there must be opportunity to be heard upon reasonable notice. The record shows that prior to the entry of the order in question an extensive hearing was held before the state board. The petitioners not only had notice but they participated in the proceeding. The state law requires complete judicial review before an order of the state board can be enforced, and the petitioners availed themselves of further judicial review by appeal to the state supreme court. Surely nothing more is necessary to meet the requirements of due process. If anything further is required, it should be remembered that before *any* punishment could be inflicted for violation of the order, a *further* complete judicial hearing would be essential upon a charge of contempt of court.

Nothing in the order under review interferes with the right of the people to assemble peaceably. The only portion of the order which could be related to the right of assembly is that part which directs the union and its officers to cease and desist from *engaging in concerted efforts to interfere with production by arbitrarily* calling union meetings *and inducing* work stoppages during regularly scheduled working hours. The provision does not prohibit *attendance* at union meetings under any circumstances; neither does it prohibit the calling of union meetings *per se*. It prohibits only concerted interference with production by "arbitrarily" calling meetings to induce work stoppages. The term "arbitrary" is defined to mean:

> "'Fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; * * *'" (Funk & Wagnall's New Standard Dictionary of the English Language)

Surely the constitutional guaranty to free assembly was not intended to permit it to be used as a cloak for quite another illegal purpose. It was admitted by union officials that the plan worked out was not from a *bona fide* desire to hold union meetings but rather to procure work stoppages and thereby exercise economic pressure on the employer (R. 47-48).

As ruled in *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1941) 236 Wis. 329, 294 N. W. 632; 295 N. W. 634, affirmed (1942) 315 U. S. 437, 86 L. ed. 946, 62 S. Ct. 706, orders are to be interpreted as applicable to the same type of circumstances as brought about their issuance. Under that rule it was held that an order might be entered restricting picketing generally, without any violation of the guaranty of free speech, because it would be construed to relate only to the objectionable type of picketing which brought about its issuance. The calling of a *bona fide* meeting would not be deemed a violation of the order in the instant case, but only the use of the device of *ostensibly* calling a meeting as a signal for a totally different purpose.

Again, it must be remembered that punishment could be imposed for violation of the order only after another judicial hearing upon a charge of contempt. If the order should ever be construed or applied so as to violate a constitutional guaranty, the aggrieved party still has full recourse to protect his rights by appeal.

III.

SEC. 111.06 (2) (c) OF THE WISCONSIN STATUTES IS NOT INVOLVED IN THIS PROCEEDING. EVEN IF IT WERE, IT IS NOT UNCONSTITUTIONAL AS CONSTRUED BY THE STATE COURT

The Supreme Court of Wisconsin affirmed the finding of the state board that the employees within the bargaining unit represented by Local 232 never conducted an election which directed the calling of a strike.

The court's affirmance of the finding was based upon the fact that the purported vote taken several months after the coercive tactics were begun was not taken by a secret ballot nor did it authorize a strike.

The court's action, however, was nothing more than an affirmance of the findings insofar as the same might become pertinent in future proceedings involving other sections of the statutes. Neither the finding nor the statute relating to strike votes is involved in this proceeding because the board based no remedial action upon it. As pointed out by this court in *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 747, 62 S. Ct. 820, 86 L. ed. 1154:

> "* * * we have the word of the Wisconsin Supreme Court that the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order. * * *"

The reason the board imposed no remedy based on the circumstance of a lack of a strike vote is doubtless because the Supreme Court has construed that portion of the state

statutes as not authorizing any affirmative remedial action for non-compliance. In *Hotel & R. E. I. Alliance v. Wis. E. R. Board*, (1941) 236 Wis. 329, 347-348, 294 N. W. 632, 295 N. W. 634 the state court indicated that the sole consequence of failure to obtain a majority vote to authorize a strike is that in such case the strikers do not have the privileges accorded by sec. 103.53 of the Wisconsin Statutes with respect to strikes authorized by such a vote. The court said:

> "* * * Less than a majority may strike, but they will be under the restrictions of the statutes as to the methods of coercion which they may use. Sec. 103.53 specifies with particularity what may be considered legal in the conduct of a labor dispute. These enumerated means striking employees not guilty of an unfair labor practice are at liberty to employ. Any court or judge is forbidden to restrain the doing of such acts when done in connection with a labor dispute. The sole difference between coercive acts in support of a strike which has been called by a majority of members of a collective-bargaining unit and one which has not been so called is that the members of a minority group do not have the benefit of sec. 103.53, that is, by indulging in an unauthorized strike they lose their privileges under that section and are subject to the provisions of ch. 111, Stats. 1939, relating to unfair labor practices. The character of their coercive acts must then be determined either by submitting the controversy to the board or by 'the pursuit of legal or equitable remedies in courts of competent jurisdiction.' If one merely withdraws from his employment he is not subject to the act."

The board has regarded the foregoing construction as precluding it from ordering discontinuance of a strike be-

cause of lack of a vote. The finding with respect to a vote may never become material until and unless some proceeding is brought involving sec. 103.53 of the Wisconsin Statutes. Unless such action is taken the particular finding carries no consequence and does not involve the deprivation of any constitutional rights.

This explanation is not given to indicate an opinion that a law precluding strikes except upon a majority vote of the employees involved would be unconstitutional; but rather to avoid extensive argument on a question which is not involved. It would seem that if laws such as the National Labor Relations Act and the Labor-Management Relations Act, 1947, can constitutionally impose upon a minority a bargaining representative by a vote of a majority of employees and thereby deprive the minority of the right to bargain through a representative of their own choosing, it would be no more objectionable to deprive the minority of a right to strike contrary to the wishes of the majority. The bargaining agent chosen by the majority can bind the minority against their will by a no-strike provision in the contract. There is little practical difference to constitutional rights if the same result may be accomplished directly by vote of the majority.

It seems difficult to us to maintain the position that a law may constitutionally impose a bargaining agent upon the minority by vote of the majority but that the same standard is unconstitutional when applied to the subject-matter which may be dealt with by the bargaining agent so selected.

CONCLUSION

The Wisconsin Employment Relations Board is required to recognize and protect *three* major interests, namely: "That of the public, the employe, and the employer." (Sec. 111.01 (1), Wisconsin Statutes for 1947.) The board is endeavoring in this case, as it does in others, to represent all three interests independently of the conflicting interests of the other parties involved. The board's position is stressed primarily for the reason that some aspects of the petitioners' brief appear to deal with the matter as if the only interests involved were the conflicting ones of employer and employee, as on page 67 where the statement is made that "the only danger shown here is that of economic injury to the employer." It is the public interest in continuance of production over the years which warrants the regulation. That interest outlasts the immediate effects upon the parties to any single case.

The board is obligated under the state statute to represent the interests of workingmen as well as of employers and of the public. Its obligation in that respect extends to representation of *all* workingmen rather than those of a small group which advocates a program which may not only run counter to the best interests of workingmen as a whole, but which may indeed be actually contrary to the desires of the great majority. The appellants represent at best a very small segment of the employee population. The interests of employees not represented in this case are, as consumers, adverse to those of the appellants. We believe the great majority of workingmen desire to have their interests represented only by methods which invoke the respect and sympathy of the public.

A concession to one group of employees may be not only inimical to the welfare of others but actually contrary to their desires. Indeed, not every concession to the demands of a particular group serves even its own best interests—just as parental over-indulgence does not serve the ultimate best interests of a child.

In any case, the *dominant* interest represented by the state board must be that of the public. The fact that the remedy which the board is here defending was applied at the instance of an employer is a mere fortuity. In other cases the remedy applied by the state board, in the interests of industrial peace and continuing production, is at the suit of labor organizations or individual employees. That is illustrated by the other Wisconsin cases before the court on this calendar—one of which was commenced at the behest of a labor organization and one at the behest of an individual employee. The legal principles to be followed are the same regardless of who is the suppliant.

If the circumstances in this case were reversed so that similar interruptions of production were caused by an employer so as to interfere with free choice of employees, the state board would be in the position of advancing the same contentions to sustain a similar restriction against employer activity.

In applying restrictions in either case, the board must not infringe unduly upon the rights of the parties as individuals. The nature of the remedy may need to vary according to the circumstances of the party in order to be appropriate; but it has been the understanding of the board that the degree of constitutional protection to which a party is entitled does not depend upon his circumstances. The constitution protects each citizen to the same extent that

it protects every other, so that the principles to be followed may not vary according to who happens to be the challenger.

Respectfully submitted,

GROVER L. BROADFOOT,
Attorney General,

STEWART G. HONECK,
Deputy Attorney General,

BEATRICE LAMPERT,
Assistant Attorney General,

Attorneys for Wisconsin Employment Relations Board.